No. 89-272



In The

# Supreme Court of the United States

October Term, 1989

SEYMOUR LITTMAN, Individually and as Mayor of the Township of Millstone, DIANAMIC INDUSTRIES, THE TOWNSHIP OF MILLSTONE, a Municipal Corporation of State of New Jersey, and COBBLESTONE-PENN LIMITED PARTNERSHIP,

*Petitioners,*

*vs.*

RICHARD GIMELLO, EXECUTIVE DIRECTOR, AND THE HAZARDOUS WASTE FACILITIES SITING COMMISSION,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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## QUESTIONS PRESENTED FOR REVIEW

Based on the foregoing, the issues appealed by the Millstone petitioners are:

1. Do the actions of respondents in this situation represent an unconstitutional deprivation of petitioners' property rights to beneficial use of their property?

2. Is the statutory scheme embodied in the New Jersey Major Hazardous Waste Facilities Siting Act abhorrent to the United States Constitution in failing to guarantee property owner full and adequate compensation for temporary and permanent loss of the beneficial use of their property?

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the court below are those listed in the caption herein. In addition this matter was consolidated below with a matter brought by the following plaintiffs:

THE TOWNSHIP OF EAST GREENWICH, a Municipal Corporation of the State of New Jersey; CARL A. BRESSLER; WALTER P. GEORGE; HARGREEN ASSOCIATES; MILTON S. DUNN; FREDERICK WAIBEL; ADELBERT THOMPSON; AND ANNA PENNELL.

The defendants in this consolidated case were identical with respondents herein.

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*Petitioners,*

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*Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY**

## OPINION BELOW

The opinion of the Supreme Court of New Jersey dated May 4, 1989, is reported at 115 N.J. 54 (1989).

## STATEMENT OF JURISDICTION

The jurisdiction of the Supreme Court to review the decision below by writ of certiorari is conferred by 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution reads in pertinent part:

> "... .[N]or shall private property be taken for public use, without just compensation."

The New Jersey Major Hazardous Waste Facilities Siting Act is set forth at N.J.S.A. 13:1E-48, *et seq.*

## STATEMENT OF THE CASE

The New Jersey Hazardous Waste Siting Commission was established in 1981 pursuant to L. 1981, c. 279 (N.J.S.A. 13:1E-48, *et seq.*) According to the statute, by September 10, 1982, the Commission was to have available the criteria for siting facilities (N.J.S.A. 13:1E-57(a)) and a hazardous waste master plan indicating what facilities were needed (N.J.S.A. 13:1E-58(a)).

In actual fact, the criteria were promulgated in June, 1983 — some 10 months after the statutory deadline — and the master plan in late March, 1985 — some 30 months after the statutory deadline.

In order to site a facility the Major Hazardous Waste Facilities Siting Act requires a two-step process:

1. formal designation by the Commission of a specific site — N.J.S.A. 13:1E-59 — a process which will take a minimum of 17.5 months from its formal initiation. As of April 1, 1987, this process had not yet begun; *then*

2. approval by New Jersey Department of Environmental Protection of a private entrepreneur's application to build an incinerator on the designated site — N.J.S.A. 13:1E-60 — a process which will take a minimum of 23.5 months.

There is nothing in the statute which provides for compensation to the property owner for property losses suffered prior to the formal designation of a site. Nor can the owner be compensated for such losses during or after the application process. To the contrary, the use of eminent domain powers by the Commission is specifically limited to a situation in which an *approved* applicant for a specific designated site has failed to purchase the site after good-faith bargaining. N.J.S.A. 13:1E-81. Thus, the statute precludes payment of *any* compensation by respondents until not less than 41 months *after* the formal designation process begins.

Moreover, there is nothing in the Act which guarantees that a formally-designated site will ever be the subject of an application. In fact the Commission, *proprio motu* or on application of a municipality, can de-designate an unused site at any time after final designation. N.J.S.A. 3:1E-59(5)(e). In this case, there is no statutory provision for compensation to property owners for any interim loss of use of their property.

On February 14, 1986, after repeated failure to meet its statutory deadlines, the Commission announced specific sites, *inter*

*alia,* those in Millstone Township — designated by Tax Map Block and Lot Number — as "candidate" sites for future formal designation. That announcement appears *not* to be part of the statutory designation process as set forth at N.J.S.A. 13:1E-59. It was an extra-statutory pre-designation "nomination".

In that February, 1986, announcement the respondent Commission targeted 3 lots on the Millstone Tax Map containing some 160± acres. As of April 1, 1987, respondent Commission had completed preliminary testing on the Millstone site and has voted to consider formally designating Millstone as a site at some point in the foreseeable future.

In addition to these lots, a number of other adjacent Millstone lots are involved because the Act requires a "buffer" between the incinerator itself (a 5-acre facility) and any place of regular habitation or employment (N.J.S.A. 13:1E-57). The owners of properties adjacent to those designated will have no way of knowing how much, if any, of their property may be subject to condemnation unless and until a specific application for an incinerator at a specific physical location is approved. Only once a facility is given a specific physical site during the application process (an absolute minimum of 41 months after formal designation begins) can adjacent property owners know what will remain of their property.

Even though the February, 1986 announcement of Millstone as a potential site was not a formal designation of the site, the effect on the properties so targeted — and those within the "buffer" half-mile from the site — was immediate and devastating. For example, as of January 28, 1986, petitioner Cobblestone-Penn was prepared to begin construction of a 190-unit senior citizens' mobile home park and community office center on a property adjacent to the designated site. Upon hearing of the proposed designation, the lending institutions previously prepared to give

construction financing withdrew and no lender has subsequently been found to enable the project to proceed.

This is understandable in view of the fact that procedures under the Hazardous Waste Facilities Siting Act:

1. provide no certainty as to how much of the site could eventually be taken;

2. provide no fixed timetable as to when a final designation would be made *or* when, if ever, a facility would be built;

3. provide no guarantee that petitioners will ever receive full compensation for their temporary or permanent loss of the use of their property.

In addition to all of the above difficulties, in the present case the location of a senior citizens' mobile home park next to a hazardous waste incinerator is virtually precluded by the problems of emergency evacuation of older people in case of an accident at the toxic waste incinerator and their greater susceptibility of respiratory ailments, etc.

A review of the statute *sub judice* and facts of which the Court can take judicial note indicate that *once the formal designation occurs* the property owners face a minimum of 41 months and more probably up to 84 months before *any* compensation will come to the property owners.

The essence of petitioners' complaint is that the actions of respondents have effectively deprived petitioners of any beneficial use of their property and they are entitled to compensation now because of that deprivation; moreover, the the Major Hazardous Waste Facilities Siting Act is unconstitutional because it precludes

such compensation now and does not guarantee property owners full and adequate compensation later. *See* United States Constitution, Fifth and Fourteenth Amendments.

Based on the foregoing, the issues appealed by the Millstone petitioners are:

1. Do the actions of respondents in this situation represent an unconstitutional deprivation of petitioners' property rights to beneficial use of their property?

2. Is the statutory scheme embodied in the New Jersey Major Hazardous Waste Facilities Siting Act abhorrent to the United States Constitution in failing to guarantee property owners full and adequate compensation for temporary and permanent loss of the beneficial use of their property?

## REASONS FOR GRANTING THE WRIT

### I.

**The actions of respondents represent an unconstitutional deprivation of petitioners' property rights to beneficial use of their property.**

For most of this century our federal and state courts have wrestled with the delicate balance between constitutionally guaranteed private property rights and governmental action for the common good which abridges those rights.

Judicial analysis through this entire time, whether analyzing claims of over-broad regulation, inverse condemnation, or contemplated or actual takings, has reiterated that each case must be decided in its unique factual setting. Each case involves a

> "question of degree [which] cannot be disposed of by general propositions". *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922) at 416.

> "Indeed we have frequently observed that whether a particular restriction will be rendered invalid by the government failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case' " *United States v. Central Eureka Mining Co.,* 357 U.S. 155 (1958).

> "In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and particularly the extent to which the

> regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations." *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978) at 124.

Given this ongoing judicial concern with a factual analysis against which to measure the constitutional mandate's applicability it is particularly surprising that the court below affirmed the dismissal of petitioners' claims on the respondents' motion for summary judgment.

In the present case, respondents claim that neither the February, 1988 targeting of the specific Millstone site nor even formal designation itself constitutes a "regulation" or a "taking" which is compensable. Petitioners, however, submit that, on the specific facts as they are juxtaposed with the statutory scheme embodied in the Major Hazardous Waste Facilities Siting Act:

> 1. Private petitioners herein have been denied virtually all reasonable use of their land under circumstances which demand immediate compensation;
>
> 2. The Act precludes such interim compensation as the constitutional mandates require; and
>
> 3. The Act is so written as to create serious doubt as to whether full and adequate compensation would ever be paid to petitioners even if and when condemnation proceedings finally occurred.

It must be emphasized *ab initio* that the present case is fundamentally different from other condemnation cases in almost every respect. The factors which make this situation *sui generis* are.

1. The specific purpose of the governmental action herein.

2. The uncertainty as to the time and exact location of the proposed taking.

3. The nature of plaintiff's specific rights here created by statute.

4. The specific procedure employed in the Act *sub judice.*

a. *The Nature of the Action.* The traditional purposes of condemnation include such improvements as parks, roads and more recently, renewal areas. In such cases the use contemplated, while an inconvenience in the short run to property owners, is in the main a general *and* a specific benefit in that the improvement usually seems to enhance property values. Common experience can serve as a guide for the owner and the court as to what happens when such improvements are installed. For example, improved road access or a redeveloped neighborhood will improve values and the general business climate.

In the present case, on the other hand, petitioners face designation as a site for the incineration of hazardous wastes. Almost no problem generates the kind of public fear and antipathy which exposure to hazardous wastes does. It was for this very reason that the Major Hazardous Waste Facilities Siting Act was proposed — to provide a vehicle for siting facilities which, absent coercive government action, simply could not be sited.

Given the extensive and intensely emotional public concern (4,000 angry residents at a Siting Commission in Burlington Township in April, 1986; 6,000 at the Millstone Meeting in September, 1986) and given the fact that there are few if any such

major incinerators currently functioning, the Court may take judicial notice that this new area of government action-designating hazardous waste disposal sites — is significantly different from designating part of a property for a road or a park.

b. *Uncertainty as to time and location.* The statutory time for the siting process can in theory be as short as 41 months. On the other hand — and more probably — it could be as long as 86 months. During this time petitioners do not know if their property will be utilized.

But even if the property owners assume that their property will eventually be taken they do not know which part or how much of their property may be condemned. The Commission has proposed designation of 3 lots with a total land area of 160± acres. The incinerator could, after these lots are designated, be located almost anywhere on them. This means that until the facility is actually located, petitioners — and adjacent owners such as Cobblestone-Penn — will not know how much of their land is subject to condemnation. In Cobblestone-Penn's case, it could be virtually nothing or virtually all.

Thus a contemplated state action having the most negative possible effect on property development can in this case hang like a poisoned yellow cloud over a specified area of Millstone Township whose exact dimensions are not fixed for a period of time which is totally uncertain.

c. *Uncertainty as to the Effect on the Surrounding Areas.* In the present case, petitioner Cobblestone-Penn has approvals for the construction of a 190-unit senior citizens' mobile home park.

Given the presumed health rationale behind the statutory prohibition against any permanent habitation with ½ mile of the

site the very existence of the hazardous waste incinerator would preclude the existence of a senior citizens' mobile home park next door, since the presence of the elderly, especially in large numbers, would present a real hazard as to emergency evacuation in case of a disaster at the incinerator. Even on an everyday basis, the air quality would probably not be healthy for senior citizens whose susceptibility to ailments in general and to respiratory ailments in particular may not be on a par with the citizenry in general.

It is crystal clear, therefore, that the very presence of the incinerator would irrevocably doom the area in terms of the use for which petitioner Cobblestone-Penn has a vested statutory right to utilize and develop his property.

Since the construction of a hazardous waste incinerator would destroy petitioner Cobblestone-Penn's ability to use his property for the zoned use because of the deterioration of the entire area, *a fortiori* the threat of same prevents the development of his property, since the final determination as to if, where and when an incinerator will be located merely will not end the damage but surely confirm it.

d. *Plaintiff's Vested Rights.* As to at least one petitioner the facts support a different status from that of the typical owner of vacant land subjected to a condemnation.

Cobblestone-Penn is a partnership which purchased a tract of land which had been granted site plan approval for a 190-unit senior citizens' mobile home park and office community center.

Prior to purchase in 1984, petitioner specifically inquired of the Township Planning Board if the approvals were still in effect. The Board in a public vote affirmed same on November 28 and December 12, 1984. The Board, through its attorney, communicated these actions to the applicant. Thus, the applicant

purchased the property in full reliance on the statutory protections afforded by the Municipal Land Use Law that would enable it to construct its senior citizens' mobile home park.

By late January, 1986, Cobblestone-Penn was ready to file its building plans. Two weeks later, on February 14, 1986, the respondent announced the the property adjacent to Cobblestone Penn's was a potential site for a hazardous waste incinerator and, thus, that part of their property might, therefore, eventually be subject to condemnation.

e. *The Specific Procedures in the Act.* Contrary to what the court below assumed from its reading of the statute, it is fair to say that the threat of designation as a hazardous waste incinerator site may well hang over the affected properties for a period of not less than 56 months and perhaps as long as 92 months!

Basically, N.J.S.A. 13:1E-59 calls for a *minimum* theoretical time of 17.5 months from the time a site is first designated. To this must be added, in reality, the actual time the administrative hearing will take. Given the complexity of the issues, the need for adequate discovery, etc., it is unlikely that the hearing will be completed in less than 4 months. Moreover, the appeals must be deemed to take somewhat longer than the theoretical minimum set forth in the Rules. A *conservative* estimate, even with expedition, would be 12 months between the Appellate Division and the State Supreme Court. Thus, the actual time for designation will, using common sense, be closer to *33* months. This is not a hypothetical construct but an actual analysis of the time frames set forth in the statute and a conservative estimate of appeal time — of which the Court can take judicial notice.

This 33 months *begins* when the Commission formally designates the site. In actuality, the Commission announced the

specific properties as candidates, by Block and Lot numbers, in February, 1986. Yet, as of April 1, 1987, these specific properties, while known to the world as candidate hazardous waste disposal sites, have yet to be "designated". The destruction of petitioner's use of their property, therefore, began in February, 1988. This means the the total time required before certainty is achieved even as to formal designation — but not necessarily as to actual site location and impact on properties like Cobblestone-Penn's — will actually be closer to 48 months!

But this 48 month "designation" process does not produce one cent of compensation nor one iota of uncertainty for the property owner. Even worse, it simply begins the process by which an entrepreneur actually makes a specific application for an incinerator on the site.

Initially, the Court must assume that while an entrepreneur could *theoretically* begin making application before the designation process is concluded, common sense tells us that no prudent entrepreneur is going to spend hundreds of thousands of dollars in design, engineering, technical and legal costs until the site is available to a legal certainty.

Thus, the 23.5 months of the application process (probably more like 34 months allowing for hearing and appeal times) is a "consecutive sentence" not a concurrent one — for the victimized property owner!

Let us assume that we are now at the end of the process — a site was designated after 33-48 months Thus, after some 56-92 months the property owners of the designated site get an offer of compensation — finally!

But how does this effect petitioner Cobblestone's premises? Only a small to medium size part of its property may be within

the ½ mile from the site within which land must be purchased. How is it to be compensated for the total loss of its land for its lawfully zoned purpose? Unless the newly-licensed entrepreneur is willing to buy the whole tract, Cobblestone-Penn must wait for condemnation, which, pursuant to N.J.S.A. 13:1E-81 can *only* occur as specified:

> "b. Notwithstanding its land acquisition and conveyance powers provided in subsection a., the commission shall not implement those powers with respect to any land or interest therein unless:
>
> (1) The site on which the facility would be constructed has been adopted by the commission pursuant to the provisions of this act;
>
> (2) An agreement has been entered into between the commission and the hazardous waste industry whereby compensation for the land or any interest therein acquired by the commission will be provided by the hazardous waste industry;
>
> (3) The hazardous waste industry has already obtained the approval of the department of the registration statement and engineering design for the major hazardous waste facility to be constructed on the land."

Under the unique procedures established by the Act, thus, a property owner:

> 1. faces instant and almost total loss of property rights because of the peculiar and frightening nature of a hazardous waste incinerator which precludes almost any reasonable use on either a short-term or long-term basis;

2. will not know in general if his property is to be taken for a *minimum* of 48 months (the "targeting" and formal "designation" phase);

3. Will not know *exactly* how much of his property is to be taken for an additional *minimum* of 23 months (the application phase); and

4. may not be compensated for his loss until an unspecified time when the preconditions necessary for condemnation have been met.

While the foregoing analysis has focused on the situation of Cobblestone-Penn, we submit that even assuming that the other property owners are, in fact, farmers who have suffered no *legal* loss from their inability to participate in Millstone's current building boom which has raised the price of farmland to over $20,000 per acre, the fact is that even farmers are deprived of reasonable use of their land as farmland.

Although we tend to regard agriculture as an "interim" use of land — until "something better" comes along — the fact is that agriculture is a business like any other and requires planning and investment. Significant investment in fertilizers and drainage tiles and their maintenance is imperative to successful agriculture. These investments are made on a planned basis. They require large expenditures in one year to reap benefits over a number of years. Their purpose is to retain the worth of the land for agricultural purposes. If the land is to be leased to another farmer, multi-year leases with requirements for making these investments are necessary to keep the quality of the farmland.

Given the uncertainty created by respondents' actions — given the total inability of the farmland owner to maintain his property in accordance with sound agricultural practices while the "yellow

cloud" hangs ominously overhead, we submit that respondents' actions have deprived all property owners herein of the reasonable use of their land.

Thus, we submit that the court below misconceived the effect of respondents' actions where he stated that petitioners may still continue to use their land as before. Clearly, they may not do so, for they can neither use their land prudently by making required investments in it nor can they commit it to other uses.

The facts here do not suggest mere diminution in the speculative value of land but massive interference with the owner's reasonable and lawful use thereof.

Because of the unique nature of the proposed hazardous waste incinerator and because of the uncertainty as to location and the uncertainty as to whether the process will take 48 months or 92 months or will ever happen at all — and because there is no statutory process for respondents under the statute to pay petitioners for their loss of the beneficial use of their property — we submit they are constitutionally entitled to compensation — compensation which the statute precludes respondents from paying.

Another significant concern not addressed by the court below is this: what would be petitioners' remedy if, after the 33 months minimum pre-designation and designation process is completed, no entrepreneur comes in to build an incinerator? (We may reasonably hypothesize that ocean burning, or the construction of a new incinerator by DuPont or Exxon eliminates the need for a Millstone incinerator). *Under the statute the property owners would not be eligible for any compensation nor would the "designation" of their land necessarily be withdrawn.* If the Commission does not of its own motion de-designate a site, the municipality must apply to the Commission to have this done

on behalf of the landowner. N.J.S.A. 13:1E-59(5)(c). Thus, some 33-48 months after the initial announcement targeting these hapless landowners they would still be in limbo — not compensated in any way nor free to use their land reasonably any more than they are today.

The Major Hazardous Waste Facilities Siting Act effectively prohibits development of petitioners' land and is thus constitutionally defective absent a finding that the statutory scheme is consonant with an intent to compensate landowners for such temporary or permanent loss of beneficial use.

The facts in the present case, when measured against the procedures set forth in the Major Hazardous Waste Facilities Siting Act, would seem to demand compensation to the property owners. The net effect of the respondents' action and the operation of the statutory procedure are to create an interim reservation of petitioners' lands for an unspecified duration of time and an unspecified extent of territory — thus, to deprive landowners of the reasonable use of their land.

> "We are in danger of forgetting that a strong public desire to improve a public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S. Ct. 158, 160 L. Ed. 322 (1922) at 416.

## II.

**The statutory scheme embodied in the Major Hazardous Waste Facilities Siting Act is abhorrent to the United States Constitution in failing to guarantee property owners full and adequate compensation for temporary and permanent loss of the beneficial use of their property.**

This brief has already suggested that interim relief for inverse condemnation in this matter is mandated by the Constitution but precluded by the statute.

But even beyond this fatal defect there is in the vagueness of the Act's procedures an equally serious failing. We have now established that an owner such as Cobblestone-Penn will be deprived of all reasonable use of his land for a period of not less than 56 months.

The next question is: At that point when condemnation is instituted will the owner as a *matter of law* be able to receive full compensation?

Were this an urban renewal case N.J.S.A. 20:3-28 would require that compensation be determined based on value as of the date of the declaration of blight. This is sensible in view of the decline in value following a declaration of blight.

But neither the Major Hazardous Waste Facilities Siting Act nor the Eminent Domain Act provides similar language for the present *unique* case. At N.J.S.A. 13:1E-81 there is a reference to the fact that compensation to be paid will be determined as provided in the Eminent Domain Act.

But absent a specific provision to the contrary, the Eminent Domain Act provides:

> "Just compensation shall be determined as of the date of the earliest of the following events: (a) the date possession of the property being condemned is taken by the condemnor in whole or in part; (b) the date of the commencement of the action; (c) the date on which action is taken by the condemnor which substantially affects the use and enjoyment of the property by the condemnee."

In the present case we can only assume that the date of valuation will be the date on which a condemnation action is commenced — some 56 months after the site is first "nominated".

Thus, under the logic espoused by respondents and the court below, the ultimate recovery of petitioner property owners would be based on valuation of their property:

— *not* as of the day of initial announcement;

— *not* as of the date of formal designation;

— *not* as of the day an application is approved;

*but* as of that day when condemnation actually began — a date not less than 56 long months after the property owners' nightmare first began.

Petitioners, therefore, submit that the process authorized under the Major Hazardous Waste Facilities Siting Act is blatantly abhorrent to the United States Constitution because on its face it places the property owner in a uniquely negative position of being targeted as a potential host property for toxic wastes and, for a period of at least 5 years thereafter, gives him neither the ability to use his property nor certainty as to the parameters of

his temporary or permanent loss nor temporary compensation or permanent compensation.

Finally, on that date when the Act may finally — and at that only possibly — afford compensation, it does so based on a valuation already diminished by 5 years of the property's being submerged in a yellow cloud of fear, emotion and threatened condemnation.

The court below rejected these arguments without reference to or consideration of this Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* ____ U.S. ____, 107 S. Ct. 2378, 96 L. Ed 2d 250 (1987) — the latest examination of the constitutional questions raised herein.

In the *First English* case, this Court held that "where the government's activities have already worked a taking of all use of property, no subsequent action can relieve it of the duty to provide compensation for the period during which the taking was effective," 107 S. Ct. at 2389. In reaching this holding this Court treated the allegation in plaintiff's complaint that it had been deprived of all use of its property as true. The case was remanded for further proceedings not inconsistent with the Court's opinion.

The plaintiff in the *First English* case never established at trial that it had lost all use of its property. The allegation that it had was dismissed in the Superior Court of California on demurrer, *i.e.,* the Court ruled that even if all use of the property had been lost, just compensation was not due. 107 S. Ct. at 2382, and the case came to this Court on that ruling, as affirmed by the California Court of Appeals. Presumably, the Church will have to prove its loss of use on remand.

Petitioners in this case now stand before the Court in virtually

the same procedural situation as the First English Evangelical Lutheran Church of Glendale. Their complaint for just compensation was dismissed by way of summary judgment in the Superior Court of New Jersey, which judgment was affirmed by the Appellate Division and State Supreme Court.

Although the opinion below recognized that, for purposes of appeal, all the allegations of the complaint must be accepted as true, 115 N.J. at 160, the court below proceeded to affirm the summary judgment upon a factual determination that "plaintiffs have failed to establish that the beneficial use of their property has been destroyed by the Commission's actions," 115 N.J. at 169.

That determination of the Fifth Amendment question presented is, therefore, in conflict with the decision of this Court in *First English Evangelical Lutheran Church of America v. County of Los Angeles, California, supra,* and is the reason relied upon by petitioners for the allowance of the writ of certiorari. Rule 17.1(c).

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion of the Supreme Court of New Jersey.

Respectfully submitted,

ERIC M. BERNSTEIN*
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*Attorneys for Petitioners*

* *Counsel of Record*

## APPENDIX A — OPINION OF THE SUPREME COURT OF NEW JERSEY

SUPREME COURT OF NEW JERSEY
A-83 September Term 1988

SEYMOUR LITTMAN, individually and as Mayor of the Township of Millstone and THE TOWNSHIP OF MILLSTONE,

Plaintiffs,

and

DIANAMIC INDUSTRIES and COBBLESTONE PENN LIMITED PARTNERSHIP,

Plaintiffs-Appellants,

v.

RICHARD GIMELLO, EXECUTIVE DIRECTOR AND THE HAZARDOUS WASTE FACILITIES SITING COMMISSION,

Defendants-Respondents.

---

THE TOWNSHIP OF EAST GREENWICH, a Municipal Corporation of the State of New Jersey, CARL A. BRESSLER, WALTER P. GEORGE, HARGREEN ASSOCIATES, MILTON S. DUNN, FREDERICK WAIBEL, ADELBERT THOMPSON, and ANNA PENNELL,

Plaintiffs,

v.

*Appendix A*

THE HAZARDOUS WASTE FACILITIES SITING COMMISSION and RICHARD GIMELLO, EXECUTIVE DIRECTOR,

Defendants.

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Argued January 30, 1989 — Decided May 4, 1989

On certification to the Superior Court, Appellate Division.

*Michael A. Pane* argued the cause for appellants.

*John A. Covino* argued the cause for respondents (*Donald R. Belsole,* Acting Attorney General of New Jersey, attorney; *James J. Ciancia,* Assistant Attorney General, of counsel; *Francine A. Schott,* Deputy Attorney General, on the brief).

*Lewis G. Adler* submitted a letter in lieu of brief on behalf of *amicus curiae,* Gloucester County (*Hasbrouck & Uliase,* attorneys).

The opinion of the Court was delivered by

GARIBALDI, J.

Plaintiffs claim that the declaration of their property as a potential site for a hazardous-waste facility under the New Jersey Major Hazardous Waste Facilities Siting Act ("Act"), *N.J.S.A.* 13:1E-49 to -91, *L.* 1981, *c.* 279, constitutes a taking of property without just compensation in violation of the United States and

*Appendix A*

New Jersey Constitutions. We hold that it does not.

I

The New Jersey Hazardous Waste Siting Commission ("Commission") was established pursuant to the Act to designate sites for hazardous waste storage, treatment, and disposal. In March 1985 the New Jersey Major Hazardous Waste Facilities Plan was formulated by the Commission. The plan anticipated that within three years the amount of hazardous waste requiring off-site treatment would exceed present capabilities by at least 167,000 tons. Therefore, it called for the construction of one or two rotary kiln incinerators and one land-storage facility.

The Commission is statutorily charged with the responsibility of locating appropriate sites for the future construction of hazardous waste facilities needed by the State of New Jersey. *N.J.S.A.* 13:1E-59. After the Commission identifies a potential facility site, that site is tested to determine if it conforms to the regulatory criteria enumerated in *N.J.S.A.* 13:1E-57 and *N.J.A.C.* 7:26-13.1 to -13.7. If a site does not meet the criteria, it is dropped from consideration. If the site satisfies the specifications, the Commission determines whether to propose the site for adoption. Once a site is proposed, a grant is made to the municipality so that a suitability study may be conducted. *N.J.S.A.* 13:1E-59(a)(i). This site-suitability study is to be completed in six months and the results transmitted to the Commission.

Within forty-five days after receipt of the study, an administrative hearing must be held to determine the appropriateness of the site. The administrative law judge makes a recommendation concerning the site. Under *N.J.S.A.* 13:1E-59(a)(4), the administrative law judge cannot recommend

a site unless there is "clear and convincing evidence" that it will not constitute a substantial detriment to public health, safety or welfare. Once the Commission receives this recommendation, it may accept or reject it and adopt or withdraw the site. This final action is subject to judicial review. *N.J.S.A.* 13:1E-59(a)(5).

Following adoption of the site, private firms will submit engineering designs for the facility. On approval of a design, the Commission will enter into negotiations for the purchase of the adopted site. If these negotiations fail, the Commission has the power to condemn the property. *N.J.S.A.* 13:1E-81.

II

In February 1986, the Commission identified eleven potential facility sites. Seven of these sites were potential incinerator sites and four were possible land storage sites. At the start of this litigation, the Commission completed testing of two of the eleven sites[1], both of which were determined to be unsatisfactory.

This appeal arises from two separate actions brought by affected landowners and municipal officials of two of the potential sites — East Greenwich and Millstone.[2] Both suits alleged that the Act constituted a "taking" of property without just

---

1. The Commission's authority to enter the land for this preliminary testing was upheld by the Appellate Division in *Forbes v. New Jersey Hazardous Waste Facility Siting Commission*, Docket No. A-5090-85T6 (Oct. 16, 1986), *cert.* denied, 107 N.J. 65 (1986).

2. Six lawsuits, including those brought by East Greenwich and Millstone, resulted from the Commission's identification of the 11 potential facility sites. Each was brought by the owners of the lands identified for testing, and/or the municipality in which the lands were located. In each the plaintiffs' claims were dismissed and judgment entered in the Commission's favor.

compensation and due process in violation of the United States and New Jersey Constitutions. The plaintiffs also questioned the authority of the Commission to enter their land to do the initial testing of the identified sites.

Plaintiffs made interlocutory applications to prevent the Commission from entering their property to test, but these requests were rejected by this Court on December 2, 1986.[3] Thereafter, the cases were consolidated, and plaintiffs moved for summary judgment on the issues of the Commission's authority to enter and test the site and whether the Act constituted a taking of property without just compensation or due process. The Commission cross-moved for dismissal of the complaints.

On January 7, 1987, the trial court, in an unpublished decision, granted defendant's motion for summary judgment and dismissed plaintiffs' complaints. It rejected their "taking" claim based on a long line of New Jersey cases, reasoning "that the mere plotting or planning in anticipation of a public improvement does not constitute a taking or damaging of the property affected." It also rejected the plaintiffs' claims that a dimunition in market value or loss of financing constitutes a compensable taking. Nonetheless, the trial court recognized that in very limited circumstances an extraordinary delay on the part of the governmental authority in determining whether the property is to be condemned may lead to a finding of inverse condemnation. Hence, the trial court dismissed plaintiffs' claims without prejudice to plaintiffs to institute another action alleging inverse condemnation.

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3. This testing was subsequently done, and the East Greenwich site was dropped from consideration. However, as of November 29, 1988, the Millstone site has been formally proposed and a grant now will be made to Millstone so it can conduct a suitability study.

*Appendix A*

The plaintiffs in the consolidated actions appealed. The Appellate Division affirmed the trial court's order granting defendants summary judgment and dismissing the complaints substantially for the reasons stated in the trial court's opinion.

The plaintiffs filed a petition for certification seeking review only of the lower courts' judgments that there had not been a compensable "taking" of their property. Specifically, they claim that the identification of their property as a potential site for a hazardous waste incinerator, combined with the time involved in the siting process, has created a "yellow cloud" that hangs over their property and has denied them all beneficial use of the land. We granted certification. 111 *N.J.* 639 (1988).

III

Because we are "reviewing the dismissal of [plaintiffs'] claims as legally insufficient, we must accept as true all the allegations of the complaint, the affidavits and products of discovery submitted on [their] behalf. We must also draw those reasonable inferences that are most favorable to [their] cause." *Portee v. Jaffee,* 84 *N.J.* 88, 90 (1980).

There are two affected landowners involved in the instant case, Dianamic and Cobblestone-Penn. Dianamic owns a portion of the property in Millstone designated as a possible site. Specific harm caused to Dianamic by designation as a potential site is not explicitly alleged. Cobblestone-Penn owns property adjacent to a portion of the possible site, and this property may have to be condemned inasmuch as *N.J.S.A.* 13:1E-57 requires development of a "buffer zone" between the facility and certain land around it.

Prior to the identification of the site, Cobblestone-Penn was

planning to develop a senior citizens mobile-home park on its property. This plan fell through following the identification of the property, and Cobblestone-Penn claims the Act has prevented it from using its property for its zoned purpose. It appears the financial backers for the trailer park became uneasy about the identification and withdrew financing, and Cobblestone-Penn could not find backing elsewhere. Also, Cobblestone-Penn takes the position that senior citizens' susceptibility to respiratory ailments renders this property unsuitable for such a purpose.

Although neither landowner appears to be involved in substantial farming operations, both assert that the threat of condemnation has made it unfeasible for them to make initial investments necessary for a long-term, successful farming operation.

IV

Both article I, paragraph 20 of the New Jersey Constitution and the fifth and fourteenth amendments to the United States Constitution prohibit the government from taking property without paying just compensation. The protections afforded under both constitutions are coextensive. *See Rieder v. State Dep't of Transp.*, 221 *N.J. Super.* 547, 553 (App. Div. 1987).

The clearest example of a taking is a situation in which property is physically invaded. 2 *Nichols on Eminent Domain*, § 6.05 at 6-34 (J. Sackman ed. 1985). Traditionally, physical invasion was an indispensable element of a "taking" claim. Note, *A Proposal for Compensating Landowners for the Effects of Urban Redevelopment*, 5 *Wm. Mitchell L. Rev.* 165, 171 (1979). This requirement, however, began to erode, and "[i]t is generally held in New Jersey [and] elsewhere . . . [that] in a few narrowly

defined situations" compensation will be awarded for "noninvasive" governmental activity: namely, off-site activities that spill-over onto the claimant's property; diminition in value flowing from governmental regulation; and diminution in value caused by pre-taking activities. Payne, *A Survey of New Jersey Eminent Domain Law,* 30 *Rutgers L. Rev.* 1111, 1188 (1977). This case involves the third type of claim (pre-condemnation activity).

Government plans ordinarily do not constitute invasion or taking of property. *Danforth v. United States,* 308 *U.S.* 271, 60 *S. Ct.* 231, 84 *L. Ed.* 240 (1939); *Wilson v. Long Branch,* 27 *N.J.* 360, *cert. den.,* 358 *U.S.* 873, 79 *S.Ct.* 113, 3 *L.Ed.*2d 104 (1958). "The mere plotting and planning in anticipation of condemnation without any actual physical appropriation or interference does not constitute a taking." *Kingston East Realty Co. v. State of N.J.,* 133 *N.J. Super.* 234, 239 (App. Div. 1975); *accord Wilson v. Long Branch, supra,* 27 *N.J.* at 374 (no taking where there is a declaration that property is in blighted area); *Rieder v. State Dep't of Transp., supra,* 221 *N.J. Super.* at 555 (no taking upon the filing of a preservation alignment map by the Department of Transportation); *Schnack v. State,* 160 *N.J.* Super. 343, 349-50 (App. Div.) (same), *certif.* den., 78 *N.J.* 401 (1978); *Far-Gold Constr. Co. v. Chatham,* 141 *N.J. Super.* 164, 169 (App. Div. 1976) (no taking where municipality's resolution expresses desire to acquire property for park as part of Green Acres program).

In contrast to a situation in which land has been physically-invaded, there is no precise formula that courts use to determine whether a compensable "noninvasive" taking has occurred. The issue depends on the facts of the case. In this case we find that none of the plaintiffs' allegations establishes that there has been

a compensable taking at this time. The identification of the eleven potential sites and the attendant publicity did not prevent the landowners from using or developing their property. Nothing in the Act or regulations thereto poses a legal impediment to the use or development of plaintiffs' land. Cobblestone-Penn's property is zoned for low-density cluster housing. There is no allegation that some other type of housing, besides senior citizens housing, could not be built on the property.

Cobblestone-Penn's allegation that it cannot build its senior citizens' trailer park because of a lack of financing does not rise to the level of a taking. Lost economic opportunities allegedly occasioned by pre-taking government activity do not constitute a compensable "taking" under either the United States or New Jersey Constitutions. *Barsky v. City of Wilmington,* 578 *F.Supp.* 170, 173 (D. Del. 1983) (absent unreasonable delay, difficulties in renting property caused by announcement of urban renewal plan not compensable); *Schoone v. Olsen,* 427 *F.Supp.* 724, 725 (E.D. Wis. 1977) (same); *East Rutherford Indus. Park v. State,* 119 *N.J. Super.* 352, 361 (Law Div. 1972) (inability to find lessees as a result of publicity surrounding proposed sports complex is *damnum absque injuria*). The loss of financing also does not amount to a taking. *Windward Partners v. Aryoski,* 693 *F.2d* 928, 929 (9th Cir. 1982), *cert. den.*, 461 *U.S.* 906, 103 *S.Ct.* 1877, 76 *L.Ed.*2d 809 (1983).

Plaintiffs' allegations concerning harm to potential farming operations are also comprised of nothing more than uncertainty caused by governmental planning and possible forgone economic opportunities. They can still use their land for farming and if it is eventually condemned, they will get a fair price for it. If it is not condemned, they can go on farming.

Likewise, we find the plaintiffs' contention that a compensable taking has occurred because the market value of their land has diminished as a result of publicity concerning the Millstone site equally unpersuasive. The cases are legion that hold that decreases in the value of property during governmental deliberations, absent extraordinary delay, are incidents of ownership and do not constitute a taking. As the Supreme Court stated: "[I]n the absence of an interference with an owner's legal rights to dispose of his land even a substantial reduction in the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth amendment." *Kirby Forest Indus. v. United States,* 467 *U.S.* 1, 15, 104 *S.Ct.* 2187, 2197, 81 *L.Ed.*2d 1, 14 (1984) (footnote omitted); *accord Agins v. Tiburon,* 447 *U.S.* 255, ____ n.9, 100 *S.Ct.* 2138, ____ n.9, 65 *L.Ed.*2d 106, 113, n.9 (1984); *Danforth v. United States, supra,* ____ *U.S.* ____ at ____, ____ *S.Ct.* at ____, 84 *L.Ed.* at 246; *Frazier v. Comindes County, Miss. Bd. of Educ.,* 710 *F.2d* 1097, 1100 (5th Cir. 1983); *Wilson v. Long Branch, supra,* 27 *N.J.* at 374-75; *Jersey City Redevelopment Agency v. Bancroft Realty Co.,* 117 *N.J. Super.* 418, 423 (App. Div. 1971); *East Rutherford Indus. Park v. State, supra,* 119 *N.J. Super.* at 360-61.

Strong policy considerations underpin our holding that lost economic opportunities, forgone financing, and diminution in market value arising from government plans and their attendant publicity do not alone give rise to a compensable taking. "The public has an interest in keeping apprised of impending government action." *East Rutherford Indus. Park, supra,* 119 *N.J. Super.* at 361-62. The disposition of hazardous waste is a major concern of the State. The problem poses substantial health and economic threats to the citizenry. The public, therefore, has a strong interest in the activities of the Commission. To that end, the Legislature has provided in the Act that the Commission give notice of its

proposed plans to the public and then conduct public hearings throughout the state. *N.J.S.A.* 13:1E-58.

V

We have held, however, "that a compensable taking can occur when governmental action substantially destroys the beneficial use of private property." *Schiavone Constr. Co. v. Hackensack,* 98 *N.J.* 258 (1985); *Lomarch Corp. v. Mayor of Englewood,* 51 *N.J.* 108 (1968); *Morris County Land Improvement Co. v. Parsippany Troy Hills,* 40 *N.J.* 539 (1963). Nonetheless, it is only when "the threat of condemnation has had such a substantial effect as to destroy the beneficial use that a landowner has made of his property, [that] there has been a taking of property within the meaning of the Constitution." *Washington Market Enterprises v. Trenton,* 68 *N.J.* 107, 122 (1975). We find no such threat in this case.

The instant case is easily distinguishable from those cases in which the government imposed a direct restraint on the use of the property, thereby depriving the owner of all beneficial use of the land for a significant period of time. *See, e.g., Schiavone Constr. Co. v. Hackensack, supra,* 98 *N.J.* at 264 (Hackensack Meadowlands Development Corporation imposed a moratorium on real estate development that covered plaintiff's 115 acres of undeveloped land); *Lomarch Corp. v. Mayor of Englewood, supra,* 51 *N.J.* 108 (municipal ordinance imposed one year restriction on right to develop land while municipality decided whether to purchase property); *Morris County Land Improvement Co. v. Parsippany Troy-Hills, supra,* 40 *N.J.* at 539 (zoning ordinance actually restricted use of swampland owned by plaintiff).

Plaintiffs' argument that their case is similar to the situation

the plaintiffs faced in *Washington Market Enterprises v. Trenton, supra,* 68 *N.J.* 107, is unpersuasive. We recognize that the plaintiffs have, to some extent, been placed in an unpleasant state of limbo as a result of the declaration and proposal of their land as a potential site. Their ability to make substantial investments has been curtailed. Realistically no one will invest in their property while there is still a risk that it will be condemned. Nonetheless, a comparison of the extreme facts in *Washington Market* and those presented in the instant case clearly discloses that at this time plaintiffs have failed to establish that the beneficial use of their property has been destroyed by its selection as a potential hazardous waste site.

In *Washington Market,* the facts were as follows. In the late 1950s Trenton undertook a feasibility study for redevelopment. The plan included construction of a mall, which would require condemnation of the plaintiff's property on which a commercial building was situated. Redevelopment began in 1963 just south of the planned mall area. In 1964 a hearing was held to discuss the prospect of declaring the mall area "blighted." No action was taken until 1967, when another meeting was held and the area declared blighted. Frequent reports of the redevelopment plans were released by city officials.

Trenton gradually began to acquire property in the target area. By 1970 half of the necessary land had been acquired. In May 1973 Trenton altered its redevelopment priorities and informed plaintiff and other remaining property owners that their lands would no longer be taken. This protracted process wreaked havoc on the plaintiff. Its tenants began moving out in 1963. It had difficulties finding long-term tenants. By 1972 the building was, for the most part, vacant. Its yearly income from the land fell from $160,000 in 1983 to $6,300 in 1973. The surrounding

area had greatly deteriorated. The practical effect of the city's ten-year course of action (and inaction) had been to leave the plaintiff with a worthless, useless, vacant building situated in a totally-devastated area. Moreover, Trenton abandoned the one plan that would have provided the owner with compensation, namely, its plan to condemn.

Unlike the plaintiff in *Washington Market,* the plaintiffs in the instant case are still able to make beneficial use of their property. At the time they initiated their action, they were free to use their land as they chose. No actual restriction was imposed on their rights to use their property. Indeed, there was a possibility that the Millstone site would not be selected. At the time they instituted their actions, there was, then, no "actual or threatened interference with the use of the property of such a permanent, serious or continuing nature to justify the conclusion that a 'taking' had occurred." *Kingston, supra,* 133 *N.J. Super.* at 240.

Moreover, plaintiffs make no specific allegations of deterioration of the surrounding area. As the court in *Schnack v. State, supra,* pointed out, "the holding in *Washington Market* clearly contemplates a reduction in value to 'near zero' . . . ." 160 *N.J. Super.* at 350. There is no allegation that plaintiffs have lost their property or that they are threatened with losing their property. There is no evidence that if the hazardous-waste project does not go through, the permanent value of their property will nevertheless be diminished. They will be left in a fine position to develop their land. On the other hand, if it does go through, they will receive compensation for their property — a possibility not open to the plaintiff in *Washington Market.* Most importantly, the plaintiff in *Washington Market* was threatened with condemnation for a substantial period of time — ten years. The

plaintiffs here have not had a "yellow cloud" over their land for nearly that long.

VI

Several factors must be considered and balanced in deciding whether a compensable-taking claim flowing from pre-condemnation activity has been established. First and foremost, extraordinary delay or other unreasonable conduct on the part of the condemning authority may give rise to a taking claim. *See Agins v. Tiburon, supra,* ____ *U.S.* ____ at n.9, ____ *S.Ct.* at n.9, 65 *L.Ed.* 2d at 113 n.9; *Barsky v. Wilmington, supra,* 578 *F.Supp.* at 173; *Kingston E. Realty Co. v. State of N.J., supra,* 133 *N.J. Super.* at 240; *A Survey of New Jersey Eminent Domain Law, supra,* 30 *Rutgers L. Rev.* at 1222; *Compensation for Landowners, supra,* 5 *Wm. Mitchell L. Rev.* at 200-02; *see also Lyons v. City of Camden,* 52 *N.J.* 89, 99 (1968) (condemning authority must act with "reasonable dispatch"); *Freeman v. Paterson Redevelopment Agency,* 128 *N.J. Super.* 448, 459 (Law Div. 1974) (unreasonable delay relevant to award of interest after taking), *rev'd on other grounds,* 138 *N.J. Super,* 539 (App. Div. 1978); *East Rutherford Indus. Park v. State, supra,* 119 *N.J. Super.* at 363 (action of condemning authority must clearly be expeditious).

In addition, the imminence of condemnation may also help to establish a taking claim. *A Survey of New Jersey Eminent Domain Law, supra,* 30 *Rutgers L. Rev.* at 1222. A property owner is more inclined to take or refrain from taking action in such circumstances. *Compensation for Landowners, supra,* 5 *Wm. Mitchell L. Rev.* at 197-98. As discussed, the severity of the injury and hardship to the property owner is yet another factor to be considered. *Washington Market, supra,* 68 *N.J.* at 122; *A Survey*

*of New Jersey Eminent Domain Law, supra,* 30 *Rutgers L. Rev.* at 1222.

All of the above factors are to be explored and weighed in conjunction with the public interest. Just as the public has an interest in keeping apprised of crucial government activities, so too it benefits from the cautious, deliberate administration of programs, such as hazardous waste disposal plans, that place encumbrances on private property.

Application of this balancing test in the instant case mandates the granting of summary judgment against the plaintiffs. They have made no showing of unreasonable conduct or extraordinary delay on the part of the Commission. Indeed, the Commission has already formally proposed the Millstone site and rejected the East Greenwich site. Further, at the time this matter was before the trial court the Commission had already rejected two other potential sites. Condemnation was hardly imminent when plaintiffs' action was brought, since they were — and still are — only part of a larger group of property owners whose lands are subject to consideration. Also, as shown, they fail to allege injuries comparable to those suffered by the plaintiff in *Washington Market.*

Essentially, plaintiffs claim a present taking based on conjecture about future facts. They contend that the procedures under the Act provide for an excessive period of delay of between forty-one to 101 months from the time of the identification of a potential site to its eventual condemnation. As the trial court correctly held, however, the question is whether the Commission's actions to date constitute a taking. The procedures under the Act on their face are not unreasonable. We decline to speculate about whether in practice their implementation will result in delays that

are so excessive as to constitute a taking.

It is unwise and unnecessary to deal with such speculative and hypothetical questions. We find no evidence in the record that the government is unduly delaying the processes. If the property is ultimately condemned, damages, if any, will be properly ascertained at that point. If the property is not condemned and no decision is made concerning condemnation for an excessively long period of time, then plaintiffs can renew their inverse condemnation claims. At this time plaintiffs have failed to establish that the beneficial use of their property has been destroyed by the Commission's actions.

Accordingly, the judgment of the Appellate Division is affirmed.

Chief Justice Wilentz and Justices Clifford, Handler, Pollock, and Stein join in this opinion. Justice O'Hern did not participate.

89-272



In The

# Supreme Court of the United States

October Term, 1989

SEYMOUR LITTMAN, Individually and as Mayor of the Township of Millstone, DIANAMIC INDUSTRIES, THE TOWNSHIP OF MILLSTONE, a Municipal Corporation of State of New Jersey, and COBBLESTONE-PENN LIMITED PARTNERSHIP,

*Petitioners,*

*vs.*

RICHARD GIMELLO, EXECUTIVE DIRECTOR, AND THE HAZARDOUS WASTE FACILITIES SITING COMMISSION,

*Respondents.*

## SUPPLEMENTAL APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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## APPENDIX A — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION (JUDGES ANTELL, DEIGHAN AND COHEN) DATED FEBRUARY 22, 1988

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2690-86-T7

SEYMOUR LITTMAN, et als.,
Plaintiffs-Appellants,

v.

RICHARD J. GIMELLO, ET ALS.,
Defendants-Respondents
Cross-Appellants.

and

TOWNSHIP OF EAST GREENWICH, et als.
Plaintiffs-Appellants,

v.

THE HAZARDOUS WASTE FACILITIES SITING COMMISSION, et als.
Defendants-Respondents,
Cross-Appellants.

Argued December 8, 1987—Decided

Before Judges Antell, Deighan and Cohen.

*Appendix A*

On appeal from Superior Court, Law Division, Monmouth County.

Timothy S. Haley argued the cause for appellant Township of East Greenwich, et als. (Gordon, Gordon & Haley, attorneys; Mr. Haley, on the brief).

Michael A. Pane argued the cause for appellant Townships Seymour Littman, et als.

Francine A. Schott, Deputy Attorney

General, argued the cause for respondents/cross-appellants (W. Cary Edwards, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel; Ms. Schott, on the brief).

Bruce C. Hasbrouck and Lewis G. Adler submitted a brief on behalf of *amicus curiae* Gloucester County.

PER CURIAM

On the consolidated main appeal the order for summary judgment in favor of defendants dated January 15, 1987 is affirmed substantially for the reasons stated by Judge Milberg in his oral opinion of January 7, 1987 for the Law Division.

On their cross-appeals, defendants ask us to reverse the order dated May 1, 1987 denying defendants' application for modification of the court's opinion of December 17, 1986. The language which the State seeks to have stricken consists of *dicta* clearly unnecessary to the decision to the effect that the State engaged "in a course of action that this Court finds irregular,

improper and violative of plaintiffs' right to due process of law." The opinion was implemented by an order dated December 18, 1986 which recited in paragraph seven the court's finding "that the Plaintiffs' constitutional guarantees of procedural due process were denied." Although the court, by the order under review, denied defendants' motion to strike the impugned language from the opinion, it granted defendants' motion to strike paragraph seven in its entirety from the implementing order of December 18, 1986.

As we stated earlier, the language in the opinion is conclusory *dicta* only and cannot govern the course of any future proceedings. Moreover, appeals "are taken from judgments and not from opinions." *Hughes v. Eisner*, 8 *N.J.* 228, 229 (1951).

Affirmed on the appeal and on the cross-appeal.

**APPENDIX B — TRANSCRIPT OF DECISION OF HON. ALVIN Y. MILBERG, A.J.S.C., ON CROSS MOTIONS FOR SUMMARY JUDGMENT, IN *EAST GREENWICH V. HAZARDOUS WASTE FACILITIES SITING COMMISSION* AND *LITTMAN V. GIMELLO* DATED JANUARY 7, 1987**

SUPERIOR COURT OF N.J.
LAW DIVISION/MONMOUTH CTY.
DOCKET NO.: L07351-86PW

SEYMOUR LITTMAN, individually and as Mayor of the Township of Millstone, DYNAMIC INDUSTRIES, the Township of Millstone, a Municipal Corporation of the State of New Jersey, and COBBLESTONE PENN LIMITED PARTNERSHIP,

Plaintiffs,

-vs-

RICHARD GIMELLY, Executive Director and the HAZARDOUS WASTE SITING COMMISSION,

Defendants.

BEFORE:
HON. ALVIN YALE MILBERG, A.J.S.C.

APPEARANCES:
TIMOTHY S. HALEY, ESQ.
For the Plaintiff.

FRANCINE A. SHOTT, ESQ.
JOHN A. COVINO, ESQ.
Attorney General's Office
For the Defendants.

HAQBROMK & ULIASE, ESQ.
For Gloucester County, amicus curiae

*Appendix B*

THE COURT: These are consolidated cases, a Chancery Division case, in Gloucester County, Township of East Greenwich versus the Hazardous Waste Facilities Siting Commission, Docket No. C-2498-86, which Judge Miller consolidated with the Monmouth County prerogative Writ Law Action Case, Seymour Littman and others versus Richard Gimello, Executive Director and the Hazardous Waste Facility Siting Commission, Docket No. L-07351-86BW.

Plaintiff in the Monmouth County case, Seymour Littman is the Mayor of the Township of Millstone, State of New Jersey. Plaintiff Dynamic Industries is a corporation of the State of New Jersey, which owns lands in the Township of Millstone, designated as Block 57, Lot2B.

Plaintiff Cobblestone Penn. Limited Partnership is a limited partnership which owns property designated as Block 57, Lot 8A on the tax map of the Township of Millstone.

Defendants are the Hazardous Waste Facilities Siting Commission, and Richard Gimello, the executive director.

The defendants named as third-party defendants, Robert Paterson and Margaret Paterson and Frances Krascvics and Joel Dobryenski.

Robert and Margaret Paterson are the owners of record of real property designated as Block 57, Lot 2 on the tax map of the Township of Millstone. Third party defendant, Joel Dobryenski is the owner of record of real property designated as Lot 57, 2A on the tax map of the Township of Millstone.

Today is the adjourned return day of the plaintiff's motion

in the Monmouth County action for summary judgment, seeking a declaration in this Court that the Hazardous Waste Facilities Siting Act, NJSA 13:1E-49 is unconstitutional as against property owners who have neither consented to consideration or have been compensated for the alleged taking of their property. And that the Hazardous Waste Facilities Siting Commission is not authorized to enter plaintiff properties.

Alternatively, plaintiffs seek to have some of the specific tests which the Commission wishes to perform declared unconstitutional as requiring compensation to be paid.

In opposition to the motion, defendants have filed a cross motion to have this matter transferred to the Appellate Division pursuant to Rule 2:2-3A2, or alternatively dismissing the complaint.

In the Monmouth County action, plaintiffs have filed a first amended complaint in Count one, Cobblestone Penn, Limited Partnership seeks judgment declaring major hazardous waste facilities, — NJSA 13:1E-49, to be violative of the New Jersey Constitution, Article I, paragraph 20, and the United States Constitution, Amendment 14 on its face, and as applied to plaintiffs. And that the Commission's siting process be declared unconstitutional and that the defendant commission be restrained and enjoined from entering the Millstone property and taking further steps to designate the Millstone site as a major hazardous waste facility.

In Count two, plaintiffs, Dynamic and Cobblestone Penn seek to have this Court declare the Commission's attempt to enter onto their land to be ultravires.

*Appendix B*

And in Count three, plaintiffs Dynamic Industries and Cobblestone Penn seek to have this Court declare the Commission's siting process, arbitrary, capricious and unconstitutional.

And in Count four, all plaintiffs seek a declaratory judgment construing the rights and occupations of the parties during the siting and licensing.

The major Hazardous Waste Facilities Siting Act, NJSA 13:1E-50 was adopted in 1981 and states in part as follows: "The Legisiature finds and declares that the proper treatment, storage and disposal of hazardous waste generated in this State is today the exception rather than the rule. That the improper treatment, storage and disposal of hazardous waste results in substantial impairment of the environment and the public health. Insuring the proper treatment, storage and disposal of hazardous waste is a public purpose in the best interest of all citizens of this State and that the only way to accomplish this purpose is to provide for the siting, design., construction, operation and use of environmentally accepted major hazardous waste facilities."

In Section 52 of the Act, the Legislature created the Siting Commission. In Section 54 of the Act, the Legislature created The Hazardous Waste Advisory Council. The Commission has two functions under the statute. Its first responsibility is to formulate a major hazardous waste facilities plan, NJSA 13:1E-58.

The plan was adopted in May, 1985 and called the determination of the number and type of new major hazardous waste facilities needed to treat, store and dispose of hazardous waste in this State, NJSA 13:1EA-58B4.

*Appendix B*

The second function of the Commission is to purpose and adopt the site designations for the number and type of new major hazardous waste facilities determined to be necessary in the plan, NJSA 13:1E-59A.

The site proposals and designations are to be based upon criteria developed by the New Jersey Department of Environmental Protection, NJSA 13:1E-57.

On February 14th, 1986 the Commission reported that after extensive Statewide effort to identify the most appropriate locations for new hazardous waste facilities, the Commission announced today that its consultant, Rogers, Golden, Alpern, Philadelphia has narrowed the search to eleven potential sites.

Seven of these sites were potential incinerator sites, four were potential land and placement sites. One of the potential incinerator sites is the property in Millstone Township, which is the subject matter of this litigation.

Before any of the potential sites can be earmarked as proposed sites, site specific investigation must be conducted to determine conformity of the sites to such regulatory factors as the flow of ground water, and the depth of seasonally high water tables.

To date the Court believes the Commission has completed testing and consideration of two of the eleven sites originally proposed. Both sites, one located in Franklin Township and another in South Brunswick Township were found not to meet the regulatory criteria concerning groundwater and were eliminated from further consideration, based on those criteria.

Testing is now underway at the potential site in Bedminister

Township. The Commission's right to conduct the testing at Bedminister was at issue in *Forbes v. Siting Commission, Docket No. L-044961-86E.* Judge D'Anuzzio approved the right of the Commision to conduct the testing and the Appellate Division confirmed that judgment and the Supreme Court has since denied certification.

Subsequent to the decision in Forbes, the Appellate Division refused to impose restraints against the testing, and the Supreme Court similarly refused those restraints and testing began.

In Burlington Township, the location of another site, a land owner and a municipality brought a suit in Federal Court, seeking to restrain the testing there. The restraints were denied by Judge Thompson on November 28th, 1986.

On December 1, 1986 the land owner filed a similar complaint in the Law Division, Burlington County. Judge Wells denied restraints and the preliminary walk over phase of the testing has been initiated and actual testing, I understand, will commence shortly, if it has not already commenced.

An action virtually identical to the one brought before this Court was also brought before the Chancery Division, Gloucester County concerning a potential site in East Greenwich Township. That case has now been consolidated with the Monmouth County case.

Restraints imposed by Judge Miller, sitting in Chancery in that case were dissolved by the Appellate Division and leave to appeal that dissolution was denied by the Supreme Court.

Testing has either begun or is expected to commence shortly

in East Greenwich. Testing is underway, or about to be underway at potential sites in Readington, Teaksbury, Maurice River and Hillsborough Township.

Plaintiffs also seek to restrain the testing in this Monmouth County action, but I denied that request on November 19th, 1986. Leave to appeal that order was denied by the Appellate Division subject to the State's representations that it would exercise the best efforts to accommodate the plaintiffs' experts. Plaintiffs subsequently appealed to the Supreme Court. Their request for relief was denied.

In the Gloucester County action, plaintiffs moved for summary judgment. Defendants cross moved for transfer of the case to the Appellate Division or in the alternative, for the dismissal of plaintiffs' complaint. The plaintiffs in that action were the Township of East Greenwich and numerous land owners. The defendants are the Hazardous Waste Siting Commission and Richard Gimello, the Executive Director.

In the Gloucester County action, the defendants allege that they own land which was identified as a potential site for a hazardous waste facility. The complaint demanded judgment declaring the Hazardous Waste Siting Act as arbitrary, capricious and unconstitutional, and that the Commission's attempts for entering onto plaintiff land were ultravires, and that the designation of the East Greenwich site was also ultravires and violative of the United States Constitution, 14th. Amendment.

On December 18th, 1986, Judge Miller disposed of the lititants' motions in order that the defendant's motion to restore the case to the active list be granted, that the County of Gloucester be permitted to participate Amicus Curiae.

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Plaintiffs' motion for Summary Judgment was denied that Gloucester County Action be transferred to Law Division, Monmouth County and consolidated with the action that is here today. And that the defendant's motion to transfer the matter to the Appellate Division or alternatively dismiss the action was denied.

As a result of Judge Miller's order, the Gloucester County case is now consolidated here today. Defendants have called to the Court's attention the fact that East Greenwich has permitted its own consultant to conduct similar tests on its property. That has no bearing on the alleged intrusive nature of the testing because something consented to cannot by its very definition be considered intrusive.

First plaintiffs allege that they are entitled to summary judgment declaring the Siting Act unconstitutional as an open ended reservation of plaintiffs' properties, plaintiffs allege is of a period not less than 25 months requires compensation to be made to plaintiff, and such compensation is prohibited by NJSA 13:1-81B.

Plaintiffs base this proposition on two theories. Initially plaintiffs outline in great detail the procedural steps required to be taken from the time the Commission adopts a plan to the time when certain sites are officially designated as hazardous waste facilities.

It is argued that conservatively speaking, this process must at least span 25 months and in fact, there may not even be an end in sight. Plaintiffs then trace the case law history of how New Jersey courts have construed what is meant by a taking. It observes that the rule as developed in New Jersey that where

governmental action has resulted in a proper owner being deprived of the use of his land for one year, a temporary taking has occurred requiring compensation in the form of an option.

Plaintiffs submit their situation falls squarely in that rule for two reasons. One, plaintiffs have been deprived of the use of their land because the possibility of their property being sited as a hazardous waste facility, has imposed a cloud on any economically advantageous negotiation. In fact, it is alleged that one plaintiff suffered a loss of $6,400,000 because he cannot develop his land as previously contemplated.

Two, the time that will transpire before a final determination is made will be at least 25 months, if not an open ended duration. Thus, plaintiffs allege that a temporary taking has occurred which entitles them to just compensation. It is alleged, NJSA 13:1E-81B prohibits the exercise of eminent domain and in turn, compensation until the site has been adopted by the Commission. And again plaintiff's submit that the final phase will not occur for at least 25 months.

Therefore, plaintiffs maintain that the act permits a taking without just compensation, contrary to New Jersey Constitution, 1947, Article 1, paragraph 20, and United States Constitution, Amendment 14, and is violative of due process of law.

Secondly, plaintiff and third party defendant argue that they are entitled to summary judgment prohibiting the Siting Commission from entering their property because the Commission lacks the present authority to condemn their property. And even if it is determined that the Commission has such a power the subsoil testing proposed constitutes a taking.

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It is urged that the Commission will not have the authority to condemn any property until all of the preliminary stages are complete. These preliminary steps will not be completed for at least twenty-five months. Therefore, presently the Commission does not have the authority to condemn and likewise, may not enter upon any property for preliminary investigation.

Alternatively plaintiffs urge that assuming arguendo that the Commission presently has any authority to enter the lands, what the Commission proposes to do or has done goes far beyond what is constitutionally permissible. In reality the Commission is seeking an easement for subsurface investigations which plaintiffs allege is beyond the perview of the preliminary entry statute, NJSA 20:3-16.

Third plaintiffs contend that the Appellate Division decision in Forbes has no bearing on the case as the legal and factual contentions in Forbes than this case. Unlike the Forbes, plaintiffs do not contend that the land is beyond the Commission's condemnation powers.

On the contrary, plaintiffs say that a condemnation has occurred, and that the statute is unconstitutional because it prohibits payment.

Finally plaintiffs argue that the Commission is capable of designating sites by two methods, even if their relief is granted and therefore the Legislature's purpose in enacting the Siting Act will not be frustrated.

In opposition, defendants initially urge that this matter should be transferred to the Appellate Division because appeals may be taken as of right to the Appellate Division to review final decisions

or actions of any State administrative agency or officer, or to review the validity of any rule promulgated by such agency or officer. Rule 2:2-3A2.

Defendants recognize the one exception to the general rule is where plaintiffs seek to compel condemnation of its property, *Leggler v. New Jersey State Highway Department*, 104 N. J. Super, 289, Appellate Division, 1968.

The reason for this exception is that where a plaintiff seeks to compel condemnation, a mechanism for resolution of factual issues must be available. See *Orleans Builders and Developers vs. Byrne*, 186 NJ Super, 432, 446, Appellate Division, 1982, certification denied, 91 NJ 528, 1982.

Defendants urge that the only inverse condemnation claim in this law suit is one that if plaintiffs lands are proposed for adoption, and if it takes two years between adoption and condemnation and if, during that time the value of plaintiffs property is affected, a taking will have occurred.

If, it states, a complaint in condemnation at all, it states an unripe one. No inverse condemnation claim requirement or dissolution of factual questions are legitimately before this Court and the Pfleger exception to the jurisdiction requirements is simply not applicable.

Defendants also argue that this action is really a challenge to the authority of the commission to implement its decision to identify plantiffs lands as a potential site by testing the lands.

It is submitted the plaintiffs admitted as much in their Notice of Motion and Complaint. Defendants contend that plaintiffs seek

a declaration that the Commission is without authority to enter their lands, and also seek an ordering requiring the State agencies remove those lands from consideration.

Defendants rely on the opinion offered by Judge Arnold in *Vantage, New Jersey, Inc. v. Hazardous Waste Facilities Siting Commission, Docket No. L51344-86C* in which the issue of whether a notice of entry constituted a taking under the eminent domain act was considered. *Vantage* involved real properties situated in Franklin Township which was listed as one of the eleven potential waste facility sites.

In discussing whether the Law Division had jurisdiction to decide this issue, the Court determined that it had with caution, because plaintiff was not challenging defendants' action in issuing the notice of entry. This Court concludes that it has jurisdiction to decide the matter.

The defendants reason that since plaintiffs are challenging defendants action in entering the property, the matter should be in the Appellate Division. Defendants also argue that even if this case did legitimately involve claims of inverse condemnation, the Supreme Court has stated that under the entire controversy doctrine, a case raising issues restricted by rule to initial resolution in the Appellate Division is to be transferred in its entirety to the Appellate Division.

Transfer is required even if the case also contains issues of which a trial court would otherwise have had jurisdiction by statute. *Pascucci, PASCUCCI, v. __aggot, 71 N.J. 40, at pages 52 to 53, 1976.* The Supreme Court noted that such a result served the ends of sounds judicial administration by avoiding the inconvenience, delay and expense instant to separate trials, at page 53.

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Applying that rationale, defendants maintain that even if this case legitimately raised an inverse condemnation claim generally to be heard in the Law Division, the existence of other challenges to the Commission's decision and its implementation require that the entire case be transferred. See also, *Ocean Cablevision Associates vs. Hovbuilt, Inc. 210 N.J. Super 626, 635, Law Division, 1986.*

In that case there was a claim of inverse condemnation against a cable television installer and was held cognizable only in the Appellate Division because its basis was the alleged unconstitutionality of a regulation promulgated by the Board of Public Utilities.

For those reasons defendants strongly urge that this matter shall be transferred to the Appellate Division for review. Plaintiffs have submitted a reply memorandum for defendants cross motion to transfer to the Appellate Division.

It is plaintiffs claim that the present situation has affected a taking in the form of an option for which compensation was to be made and the proposed onsite activities of the Commission require an easement for which compensation must be made.

Furthermore, plaintiffs maintain that this is an inverse condemnation matter and properly belongs in the Law Division. Plaintiffs are of the opinion that this precise issue raised by plaintiffs' cross motion was raised and rejected by the Supreme Court in *Schiavone v. Hackensack Meadowlands Development Commission, 98 NJ 258, 1985.* Where the action was originally brought in the Appellate Division, but on appeal the Supreme Court remanded it to the Law Division.

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Moreover, plaintiffs argue the Commission has brought this same motion, and it had been determined adversely to them in *Vantage Industries v. Siting Commission* and *Forbes vs. Siting Commission*.

Finally, plaintiffs maintain that the Commission is not a state agency for jurisdictional purposes and therefore, appeal from its decision are accountable in the trial division. For those reasons plaintiff contended it is clear that jurisdiction in this matter is in the trial division, Superior Court, and not the Appellate Division.

Given the fact that an affirmative disposition to defendants cross motion to transfer the matter to the Appellate Division would for purposes of this trial court, render moot all other issues. It is appropriate at this time to rule on defendants' cross motion.

In that regard, I make the following findings of fact and conclusions of law, New Jersey Court Rule 2:2-3A2, provides that appeals may be taken to the Appellate Division as of, right to review final decisions or actions of any state administrative agency or office. And to review the validity of any rule promulgated by such agency or office.

Initially I am not persuaded by the plaintiffs' contention that for jurisdictional purposes, a Commission is not a State agency. NJSA 13:1E-2 establishes, "In the executive branch of the State Government, the public body, corporate and politic, with corporate succession to be known as a Hazardous Waste Facility Siting Commission, the Commission is allocated with the Department of Environmental Protection. The Commission is a constituted instrumentality of the State exercising public and essential governmental functions, NJSA 13:1E-52.

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March 21, 1969, the Appellate Division recognized the distinction which exists between an ordinary State agency operating as an arm of the executive branch and the various authorities which the Legislature has created as entities independent in the State.

*Garden State Parkway Employees Union versus New Jersey Highway Authority, 105 NJ Super 168, 170 Appellate Division, 1969.* Based on that distinction the Court ruled that the defendant Highway Authority was not a State Administrative agency.

However in analyzing the definition of the commission, provided by the Legislature, and utilizing the distinction set forth above, I am satisfied that the Hazardous Waste Facility Siting Commission is an arm of the executive branch and is not an entity independent in the State.

Although I recognized that the holding in *Garden State Parkway* somewhat questioned, — given the Supreme Court's determination. *Jacobs versus New Jersey State Highway Authority, 54 NJ 393, 1969* is the means enunciated in Garden State Parkway by which I am guided and no so much the result.

In Jacobs, the Supreme Court decided that approximately four months after Garden State Parkway, that a suit brought against the New Jersey State Highway Authority was properly cognizable in the Appellate Division under then Rule 4:88-8, now Rule 2:2-3A2.

Furthermore the Legislature has defined a State Agency to include each of the principle departments in the Executive Branch of the State Government; and all boards, divisions, commissions, agencies, departments, councils, authorities, offices or officers

within any such department now existing or hereafter established and authorized by statute to make, adopt or promulgate rules or adjudicate contested cases except the office of the Governor, NJSA 52:14B-2A.

Based upon the foregoing I find plaintiffs argument is without merit. Therefore the Hazardous Facilities Siting Commission is a State Administrative Agency for purposes of Rule 2:2-3A2. However, this does not end the matter.

Initially defendants contended that this action seeks a review of action taken by State agency and as such Rule 2:2-3A2 mandates that the review should be had in the Appellate Division.

I am not so convinced. As Counsel agree, with regard to Millstone and East Greenwich, the siting process is in its preliminary stages. I conclude that there has been no state action or lack thereof which would activate the automatic Appellate process,

In fact, the Legislature specifically pointed out when such an event is to be construed to have occurred, and I quote, "5. Within 30 days of the receipt thereof, the Commission shall affirm, conditionally affirm or reject the recommendation of the Administrative Law Judge and adopt or withdraw the proposed site. Such action by the Commission shall be based upon the potential for the significant impairment of the environment or the public health, and shall considered to be final agency action thereon for the purpose of the Administrative Procedure Act, and shall be subject only to judicial review as provided in the rules of Court, NJSA 13:1E-59A5.

Had the Legislature intended an earlier point it would have

so provided. For the purposes of this cross motion only, I recognize while neither complaint seeks a judgment compelling the Commission to condemn plaintiffs properties, the underlying theme pervading counsels arguments is inverse condemnation claims.

In effect, plaintiffs urge that there has been a taking without just compensation. It is well settled, condemnation action are to be brought in the Law Division. *Pfleger versus N.J. State Highway Department, 104 NJ Super 289, 291 Appellate Division, 1968.* In re: *Jersey Central Power and Light Company 166, NJ Super, 540, 544, Appellate Division 1979. Schiavone Construction v. Hackensack, 98 NJ 258, 265, 1985.*

The Eminent Domain Act of 1971 governs all condemnation cases, NJSA 20:3-4. This includes cases for inverse condemnation. Sorbonne at page 265. Jurisdiction in inverse condemnation proceedings should be in the Law Division of this Court where a factual record can be developed. *Orleans Builders and Developers v. Byrne, 186 N.J. Super, 432, 446, Appellate Division, 1982, certification denied, 91 NJ 528, 1982.*

Although defendants argue that any inverse condemnation claim is hypothetical and speculative. I am convinced that this Court is the appropriate forum to determine the validity of the allegations, so that a factual record can be established. *Orleans Builders and Developers vs. Byrne, 186, NJ Super 432, 446, Appellate Division, 1982.*

Defendants alternatively submit that since plaintiffs are really challenging the defendants' authority to propose, adopt and enter the lands, Appellate Division is the appropriate forum. Defendants urge that there is support for this proposition.

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In Judge Arnold's comments contained in *Vantage New Jersey, Inc. v. Hazardous Waste Facilities Siting Commission, Docket No. L-51344-86E.* In Vantage it was stated, because plaintiff is not challenging defendants' action in issuing the notice of entry, this Court, a Law Division, concludes it has jurisdiction to decide the matter.

I am not bound by Judge Arnold's Law Division decision in *Vantage, Mazza v. Insurance Company of North America, 149 NJ Super, 60, 62, Law Division, 1977.* Our system of juris prudence envisions that while the opinions of courts of coordinate jurisdiction be taken into consideration, they are nevertheless not binding on a court of equivalent rank. *Wolf vs. Home Insurance Company, 100 NJ Super, 27, page. 35, Law Division, 1968, affirmed 103 NJ Super, 351 Appellate Division, 1968.*

Secondly the opinion in Vantage has not been approved for publication, and as such does not constitute nor is it binding upon this Court. Rule 1:36-3.

Furthermore the aforementioned comment should not be read beyond what is intended especially, given the fact that it addresses an issue not before the Vantage Court. With these guidelines in mind. I shall not take Judge Arnold's dicta out of context and rely on it decide an issue not squarely presented before Judge Arnold.

Therefore, this Court is not persuaded by the defendants' analogy to that limited finding enunciated in Vantage. Defendants also rely on the entire controversy doctrine claiming that a case raising the issues restricted by rule to is to be transferred in its entirety to the Appellate Division.

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Thus defendants contend that even if this case legitimately raised an inverse condemnation claim generally to be heard in Law Division, the existence of other challenges require that the entire case be transferred.

However, defendants fail to persuade this Court of the existence of other purported challenges which require automatic Appellate review and have not previously disposed of.

For the foregoing reasons I am satisfied this Court is the appropriate forum to dispose of this matter and therefore, defendants' motion to transfer this case to the Appellate Division is denied.

I shall now proceed to dispose of the substantive issues raised on the motions and since the issues are similar in Glouster and Monmouth County. I shall address these issues in each of the consolidated cases.

Plaintiffs first argue that a taking has occurred for which the Act does not permit compensation to be paid until after the following four events have occurred. First the site on which the facility would be constructed has been adopted by the Commission pursuant to the provisions of this Act.

Second agreement has been entered into between the Commission and the Hazardous Waste Industry for compensation for the land or any interest there acquired by the Commission will be provided by the hazardous waste industry.

Third, the hazardous waste industry has sought to obtain the land or any interest therein from the owner thereof, in good faith bargaining.

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And four, the hazardous waste industry has already obtained the approval of the New Jersey Department of Environmental Protection for the registration statement and engineering design for waste facility to be constructed on the land.

Plaintiffs urge that at least twenty-five months must pass before these events can occur, and in reality the duration will probably be longer if not unlimited. Therefore a temporary taking has occurred in the form of an option for *Lomarch Corp. v. Mayor of Englewood, 51 NJ 108, 1968. Washington Market Industries vs. Trenton, 68 NJ 104, 1975, Sorbonne Construction v. Hackensack Meadowlands Development, 98 NJ 258, 1985.*

I am not persuaded by the plaintiffs argument that the minimum contemplated time from site proposal to approval of registration statement, engineering design is 25 months. That is a maximum contemplated time. Almost all of the time constraints contained in the Act speak of the time within the immediately preceding event.

For example, within eighteen months of the effective date of the Act, or within six months of the receipt of the criteria from the department, whichever is sooner, the Commission shall propose site, and provide the governing body with a grant. NJSA 13:1E-59A1. Within six months of the receipt of a grant from the Commission, the governing body shall complete and transmit to the Commission, the site suitability study, NJSA 13:1E-59A2.

Within 45 days of receipt by the Commission of the Site Suitability Study, a hearing shall be conducted. NJSA 13:1E-59A3. Thus the actual time involved might be considerably less than the Act's 25 months maximum.

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The question however, still remains that whether or not the Commission's action thus far constitutes a taking in the Constitutional sense. As plaintiffs correctly point it, it is axiomatic that New Jersey Constitution 1947, Article 1, paragraph 20, and the United States Constitution, Amendment 14, require government to pay just compensation for a taking.

Private property should not be taken for public use without just compensation. New Jersey Constitution Article 1, paragraph 20. The Courts have held that the mere plotting or planning and anticipation of a public improvement does not constitute a taking or damaging of the property affected. *State vs. Carragen, 36 NJL 52, 1872, Sorbino v New Brunswick, 43 NJ Super, 554 Law Division, 1957, Kingston East Realty Co. v. State of New Jersey, 133 NJ Super, 234 Appellate Division, 1975, Fargold Construction Co. v. Chatham, 141 Super, 164, Appellate Division, 1976, Schnack vs. State, 168 NJ Super 343, Appellate Division, 1978.*

*Annotations Condemnation preimprovement planning, 37A, 127, 1971.* This holding was specifically quoted in Kingston East Realty Co. at page 239. The mere plotting and planning in anticipation of condemnation, then the actual physical appropriation or interference, does not constitute a taking or compel a state to institute condemnation proceedings.

Plaintiffs argue that this holding can no longer be considered good law in light of the Supreme Court statement in *Washington Market Enterprises vs. Trenton, 68, NJ 107, 110, 1975* which was decided four months after Kingston East Realty Co.

That we hold that where planning for urban redevelopment

is clearly shown to have such a severe impact substantially to destroy the beneficial use which a landowner has made of his property, then there has been a taking of propery within the meaning of that institutional phrase. *Washington Market at page 110.*

Plaintiffs hold that the holding in *Schnack v State, at page 349* is also incorrect because Shank relies on Kingston. Although plaintiffs argument is creative, it is for a superior court to determine what remains to be good law and not for the litigants.

The Court in *Fargold Construction Co. v Chatham, 141, NJ Super 164, 169 Appellate Division, 1976* cited the Kingston rule and then continues to differentiate *Washington Market Enterprises v. Trenton.*

If the Appellate Division found Kingston rule to be at odds with the holding in Washington Market, then that would have provided the occasion to so rule. They did not do that however.

In the federal jurisdiction, the rule is similar as stated in *Kirby Forest Industries, Inc. v. United States, 467, US 1, 104, Supreme Court, reported to 187, 1984.* Where notice of lis pendens was filed simultaneously with the following of a complaint in condemnation, the Court concluded, however we do not find prior to the payment of the condemnation award in this case, in interference with petitions of property interest severe enough to give rise to a taking under the foregoing theory. Kirby at page 104. Strike that, 104 at Supreme Court, at 2196.

Plaintiffs further argue that the Commission's action have in fact deprived plaintiffs of property without due process of law. They base this proposition on the allegation that the designation

of the sites has prevented development of their land in an economically advantageous manner.

To determine whether this argument has merit, it is appropriate to draw upon the decisional law analogizing the condemnation by regulation. *Schnack v. State at page 349.* In such cases, it is generally held that governmental regulations which effectively deprives an owner of all reasonable uses of his property amounts to a compensable taking. By contrast, regulations which leave the owner free to reasonably use his property and the restrictions imposed by the populations and also with diminution in market value are not regarded as compensable.

The actions of the defendants herein have not deprived the land owners of all beneficial use of their land for an indeterminate length of time. *East Rutherford Industrial Park v State, 119 NJ Super 352, 371 (Law Div.) 1972.*

In fact the Commission has not abridged any rights of plaintiffs with regard to their lands. As was stated in *Kirby Forest Industries, 467, US 1, 1984.* Nor did the Government abridge petitioner's right to see the land if it wished. It is certainly possible as petitioner contends that the initiation of condemnation proceedings, publicized by the filing of the notice of lis pendens reduced the price that the land would have fetched, but impairment of the market value of the real property incident to otherwise legitimate action ordinarily does not result in a taking.

See, *Agins v. City of Tiburon, 447, U.S. at page 263, note 9, 100 Supreme Court Reporter at page 2143, note 9: Danforth versus United States, 308 U.S. at 285, 60 Supreme Court, at pages 236, 237, Village of Euclid v. Ambler Realty, 272 U.S. 365, 47 Supreme Court Reporter, 114.*

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At least in the absence of an interference with an owner's legal right to dispose of his land, even a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment. See, *Kirby at 104 Supreme Court at 2197.*

Plaintiffs may still continue to use their land as before. Even if the bare allegation that further progress in advancing the financing was halted due to the risk of uncertainty placed on the land is sustainable, — such a burden is an incident of ownership only and certainly at a substantial destruction of the beneficial use of their property. *Danforth versus United States, 308 US. 271, 1939.*

For these reasons I find that the Commission's action in identifying plaintiffs lands as a potential proposed site did not result in a taking for which compensation must be paid, nor does the siting process violate plaintiff's right to due process of lands.

Therefore, Count I and Count III of the First Amended Complaint filed in the Monmouth County action are dismissed with County VI and Count VII of the First Amended Complaint for Declaratory Equitable Relief originally filed in Gloucester County matter are also dismissed for all of the reasons stated heretofore.

In conclusion, the Court summarizes its disposition of the matters presented before it today as follows: Plaintiffs motion for summary judgment is denied for reasons consistent with the above findings.

Defendants cross motion to transfer this matter to the Appellate Division is denied for reasons stated herein.

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Counts I, II, III and IV of the Monmouth County action dismissed for the reasons herein before stated.

Counts I, II, III, IV, V, VI, VII and VIII of the Gloucester County action which is now consolidated with the Monmouth County Action is dismissed for the reasons herein before stated.

Accordingly the complaints filed in Monmouth County and Gloucester County be and the same are hereby dismissed.

No. 89-272



In The

# Supreme Court of the United States

October Term, 1989

SEYMOUR LITTMAN, Individually
and as Mayor of the Township
of Millstone, DIANAMIC INDUSTRIES,
THE TOWNSHIP OF MILLSTONE,
a Municipal Corporation of the
State of New Jersey, and
COBBLESTONE-PENN LIMITED PARTNERSHIP,

*Petitioners,*

v.

RICHARD GIMELLO, Executive Director,
and THE HAZARDOUS WASTE
FACILITIES SITING COMMISSION,

*Respondents.*

## RESPONDENTS' BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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## QUESTIONS PRESENTED

1. Whether the declaration of certain real property by the New Jersey Hazardous Waste Facilities Siting Commission as a potential site for a hazardous waste incinerator constitutes a taking of property without just compensation in violation of the United States Constitution?

2. Whether the Major Hazardous Waste Facilities Siting Act, which provides for the exercise of the power of eminent domain following the completion of a multi-tier administrative siting process, is violative of the United States Constitution?

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the court below are accurately set forth by petitioners. Respondents note, however, that the consolidation of cases mentioned by petitioners was made by the trial court. The potential site located in the Township of East Greenwich, New Jersey, was eliminated from further consideration by respondent Commission before the petition for certification was sought before the New Jersey Supreme Court. Therefore, none of the plaintiffs in the East Greenwich proceeding participated in any way in the matter before the New Jersey Supreme Court.

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## COUNTER-STATEMENT OF THE CASE

The New Jersey Legislature enacted the Major Hazardous Waste Facilities Siting Act ("Act"), *N.J.S.A.* 13:1E-49 *et seq.*, in 1981. As the court below noted, the Act created respondent Hazardous Waste Facilities Siting Commission ("Commission") and charged it "with the responsibility of locating appropriate sites for the future construction of hazardous waste facilities needed by the State of New Jersey. *N.J.S.A.* 13:1E-59." *Littman v. Gimello*, 115 *N.J.* 154, 157, 557 *A.*2d 314, 316 (1989) (Petitioners' Appendix A, page 3a).

In February 1986, the Commission identified 11 potential sites it preliminarily believed to be environmentally suitable for facility location. Seven of the sites were potential sites for a hazardous waste incinerator. The remaining four were potential sites for an above-ground emplacement facility. *Littman v. Gimello, supra*, 115 *N.J.* at 158, 557 *A.*2d at 316 (Petitioners' Appendix A, page 4a).

The identification of the 11 potential facility sites was an extremely preliminary step by the Commission. It was, in fact, not required by the Act and was thus preliminary even to the beginning of the multi-step review process established by the Act. *N.J.S.A.* 13:1E-59(a)(1) through (5). The identification was made simply because the Commission needed to enter upon the potential sites for testing to confirm or refute hydrogeological assumptions made about each site relative to mandatory siting criteria. *See N.J.S.A.* 13:1E-57 and *N.J.A.C.* 7:26-13.1 *et seq.* The Commission felt that a frank public announcement of even such a preliminary step was the most appropriate course to follow.

If the testing revealed that a site failed to conform to the criteria, the site would be eliminated from further consideration as a hazardous waste facility site. If a site was found to conform to the criteria, the Commission would then decide whether or not to propose that site for designation as a facility site. *N.J.S.A.* 13:1E-59(a)(1).

In fact, the "proposal for designation" is only the beginning of the multi-step administrative review process mandated by the Act. *Id.* At least four additional steps must occur before the Commission is considered to have taken "final agency action" (subject to judicial review) concerning the site. The steps are: (1) the awarding of a grant from the Commission to the affected municipality for the conducting of a site suitability study by consultants acting on behalf of the municipality; (2) the municipal site suitability study itself; (3) a plenary adjudicatory hearing before the New Jersey Office of Administrative Law, in which the administrative law judge (ALJ) cannot favorably recommend the site for location of the hazardous waste facility unless the ALJ finds that the facility will not constitute a substantial detriment to the public health, safety and welfare of the affected municipality; and (4) a vote by the Commission whether to affirm, conditionally affirm or reject the ALJ's findings. For that vote, the Commission will be expanded by two additional voting members. One will be appointed by the governing body of the affected municipality and the other will be appointed by the governing body of the county in which the facility is located. *N.J.S.A.* 13:1E-59(a)(1) through (5) and *N.J.S.A.* 13:1E-52(c).

The Commission's decision is appealable as of right to the Appellate Division of New Jersey Superior Court.

*N.J.S.A.* 13:1E-59(a)(5); *N.J. Rules of Court* 2:2-3(a)(2) (Pressler ed. 1989). Once the administrative review process is completed, an engineering design for the facility has been approved and negotiations for the purchase of the site have proven unsuccessful, the Commission is authorized to exercise powers of eminent domain to acquire the adopted site. *N.J.S.A.* 13:1E-81.

Among the seven potential incinerator sites identified by the Commission in February 1986 was real property located within petitioner Township of Millstone ("the Millstone potential site"). Petitioner Dianamic Industries ("Dianamic") owns a portion of the Millstone potential site. Petitioner Cobblestone-Penn owns property adjacent thereto. If the Millstone potential site were adopted by the Commission – an event that has not yet occurred and may never occur – a portion of petitioner Cobblestone-Penn's property may have to be condemned as part of a "buffer zone" required for the facility. *N.J.S.A.* 13:1E-57.

Prior to identification of the Millstone potential site, Cobblestone-Penn had plans to develop a senior citizens mobile home park on its property. Absolutely nothing in the Commission's action in identifying the potential site in Millstone has ever posed a legal impediment to such a development. Nothing in the Act or its regulations has placed any type of restriction, moratorium, "freeze" or other prohibition whatsoever against the development of the potential site. As the court below noted, "The identification of the eleven potential sites and the attendant publicity did not prevent the landowners from using or developing their property. Nothing in the Act or regulations thereto poses a legal impediment to the use or

development of [petitioners'] land." *Littman v. Gimello, supra*, 115 *N.J.* at 162, 557 *A.*2d at 318 (Petitioners' Appendix A, page 9a).

Nevertheless, as the court below noted, petitioners brought suit alleging "that the Act constituted a 'taking' of property without just compensation and due process in violation of the United States and New Jersey Constitutions." *Id.* at 158, 557 *A.*2d at 316 (Petitioners' Appendix A, pages 4a to 5a). The trial court dismissed the complaint (Petitioners' Supplemental Appendix, page 28a). The dismissal was affirmed by the Appellate Division of New Jersey Superior Court substantially for the reasons stated in the trial court's opinion (Petitioners' Supplemental Appendix, page 2a).

The New Jersey Supreme Court granted petitioners' petition for certification. *Littman v. Gimello*, 111 *N.J.* 639, 546 *A.*2d 550 (1988). In November 1988, pending oral argument before that court, respondent Commission proposed the Millstone site for designation, the first step in the administrative review process mandated by the Act. *Littman v. Gimello, supra*, 115 *N.J.* at 168, 557 *A.*2d at 321. (Petitioners' Appendix A, page 15a).*

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* The ten other potential sites identified by the Commission in 1986 were eliminated between 1986 and 1988. Testing continues at the Millstone potential site; the Commission could eliminate that site at any time throughout the entire multi-step review process if test results warrant such action. *See N.J.S.A.* 13:1E-59(c). Further, the Commission can eliminate the site in

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The New Jersey Supreme Court affirmed the Appellate Division's decision. *Littman v. Gimello, supra,* 115 *N.J.* at 169, 557 *A.*2d at 321 (Petitioner's Appendix A, page 16a). The decision of the court below was rendered on May 4, 1989. On August 3, 1989, petitioners filed their petition for a writ of *certiorari.* Respondents submit that the writ should be denied.

## REASONS FOR DENYING THE WRIT

**The Petition For A Writ of Certiorari Should Be Denied Since The New Jersey Supreme Court Correctly Decided That The Mere Designation Of A Potential Site For A Hazardous Waste Incinerator Did Not "Take" The Property Without Just Compensation Under The United States Constitution.**

The Court generally will issue a writ of certiorari "only when there are special and important reasons therefor." Rule 17.1. Among the reasons that may cause the Court to issue a writ are "[w]hen a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals" and "[w]hen a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in any way in

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favor of a site proposed by a hazardous waste industry. *See N.J.S.A.* 13:1E-59(b) and (c). In fact, at this time the Commission is reviewing an application by GAF Chemical Corporation to site the incinerator on GAF's industrial tract in Linden, New Jersey (Respondents' Appendix, page 1a).

conflict with applicable decisions of this Court." Rule 17.1(b) and (c).

Respondents submit that the petition in this case demonstrates none of those reasons. The decision of the court below was fully in accord with this Court's rulings on the "taking" issue. The only case petitioners cite as presenting a conflict, *First English Evan. Luth. Ch. v. Los Angeles Cty.*, 482 *U.S.* 304, 107 *S.Ct.* 2378, 96 *L.Ed.*2d 250 (1987), is readily distinguishable. Further, as even petitioners assert, this case presents "specific facts." (Petition, page 8). The decision would affect few, if any, individuals beyond the litigants to this case.*

Petitioners have summarized their argument as follows:

> The essence of petitioners' complaint is that the actions of respondents have effectively deprived petitioners of any beneficial use of their property and they are entitled to compensation now because of that deprivation; moreover, the Major Hazardous Waste Facilities Siting Act is unconstitutional because it precludes such compensation now and does not guarantee property owners full and adequate compensation later. [Petition, pages 5 to 6].

The reasons why the writ should be denied concerning each of those points will be addressed *seriatim*.

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* The only other potential site currently under consideration by the Commission is the GAF site in Linden, New Jersey. See note, page 4 *supra*. Since GAF has applied to build the facility, little if any land would have to be condemned if the Commission chose the Linden potential site instead of the Millstone potential site.

### A. The Actions Of Respondents Have Not Effectively Deprived Petitioners Of Beneficial Use Of Their Property. Petitioners Have No Right To Receive Compensation.

The actions of the Commission to date concerning the property in question have been nothing more than the preliminary steps of identifying it as a potential hazardous waste facility site, proposing the site for designation and issuing a grant to Millstone Township for performance of a municipal site suitability study as required by the Act. *N.J.S.A.* 13:1E-59.* Other administrative review steps, such as a plenary hearing before the New Jersey Office of Administrative Law – in which the Commission has the burden of proof by a "clear and convincing" standard – are also required by the Act even before judicial review occurs. *Id.*

The Millstone potential site could be eliminated from further consideration at any time throughout the multi-step administrative review process which has now barely begun. *See* Counter-Statement of Facts, page 2, *supra*. At no point until the Commission actually exercises eminent domain powers, which it cannot do until after adoption of the site following the administrative law hearing

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* Only the identification of the site as a potential facility site had occurred when petitioners brought suit in 1986. The proposal for designation occurred in November 1988, while the case was pending before the New Jersey Supreme Court. *Littman v. Gimello, supra*, 115 *N.J.* at 168, 557 *A.*2d at 321. (Petitioners' Appendix A, page 15a). Issuance of the grant occurred in August 1989, about three months after the court below rendered its decision.

(which hearing and adoption have not yet occurred and may never occur), does the Commission have any authority whatsoever to impose any restrictions, moratoriums, "freezes," or other prohibitions of any kind against development of a potential site. As the court below stated, "Nothing in the Act or regulations thereto poses a legal impediment to the use or development of [petitioners'] land." *Littman v. Gimello, supra,* 115 *N.J.* at 162, 557 *A.*2d at 318 (Petitioners' Appendix A, page 9a).

The decision of the court below that no "taking" has occurred is therefore fully in accord with decisions of this Court. Where no law infringes upon the landowner's freedom to make whatever use it pleases of its property, no taking has occurred. *Kirby Forest Industries, Inc. v. United States,* 467 *U.S.* 1, 15, 104 *S.Ct.* 2187, 2196, 81 *L.Ed.*2d 1, 13 (1984). In *Kirby Forest,* "petitioner [was] unable to point to any statutory provision that would have authorized the Government to restrict petitioner's usage of the property prior to payment of the award." *Ibid.* (Footnote omitted). The same is true in this case. *Compare, First English Evan. Luth. Ch. v. Los Angeles Cty., supra,* 482 *U.S.* at 307, 107 *S.Ct.* at 2381-2382, 96 *L.Ed.*2d at 259, in which an interim ordinance indeed prohibited construction within a flood protection area.

Petitioners contend, however, that even absent legal restrictions upon development, the Commission's consideration of the potential site effects a taking because it hangs "like a poisoned yellow cloud" over such development. (Petition, page 10). The court below accepted as true the allegations that the Commission's actions had adverse effects on salability and financing. *Littman v. Gimello, supra,* 115 *N.J.* at 162-163, 557 *A.*2d at 318-319

(Petitioners' Appendix A, pages 8a to 10a). The court below correctly found nonetheless that no taking had occurred thereby because, as it stated, "[t]he cases are legion that hold that decreases in the value of property during governmental deliberations, absent extraordinary delay, are incidents of ownership and do not constitute a taking." *Id.* at 163, 557 *A.*2d at 319 (Petitioners' Appendix A, page 10a). The court below then quoted this Court's decision in *Kirby Forest, supra*:

> (I)n the absence of an interference with an owner's legal rights to dispose of his land even a substantial reduction in the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment. Kirby Forest Indus. v. United States [*supra*], 467 U.S. [at] 15, 104 S.Ct. [at] 2197, 81 L.Ed.2d [at] 14. [*Littman v. Gimello, supra*, 115 *N.J.* at 163, 557 *A.*2d at 319 (citations omitted). (Petitioners' Appendix A, page 10a)].

Petitioners argue that the procedures of the Act effect a taking because the landowner "faces almost total loss of property rights" for an indefinite period which petitioners claim could last up to 92 months from the identification made in February 1986. (Petition, page 14). Respondents submit that petitioners' argument cannot support the issuance of the writ.

First, the decision of the court below that the landowner petitioners have not lost the beneficial use of their property was fully consistent with decisions of this Court. The legal premise of petitioners' argument is thus invalid. Of perhaps even greater significance is the fact that petitioners' claim of a present taking is based entirely upon gross conjecture as to the future. Petitioners

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> condemnation. As the trial court correctly held, however, the question is whether the Commission's actions to date constitute a taking. The procedures under the Act on their face are not unreasonable. We decline to speculate about whether in practice their implementation will result in delays that are so excessive as to constitute a taking. [*Id.* at 168, 557 *A.*2d at 321 (Petitioners' Appendix A, pages 15a to 16a)].

The court below stated that "[i]t is unwise and unnecessary to deal with such speculative and hypothetical questions." *Id.* (Petitioners' Appendix A, page 16a). This Court has long held that it will not attempt to forecast issues or decide them hypothetically. *See Morgan v. United States*, 304 *U.S.* 1, 26, 58 *S.Ct.* 999, 1001, 82 *L.Ed.* 1129, 1136 (1938); *Smiley v. Holm*, 285 *U.S.* 355, 375, 52 *S.Ct.* 397, 402, 76 *L.Ed.* 795, 804-805 (1932). *See also Abbott Laboratories v. Gardner*, 387 *U.S.* 136, 148, 87 *S.Ct.* 1507, 1515, 18 *L.Ed.*2d 681, 691 (1967) (courts should avoid "premature adjudication" by avoiding "abstract disagreements"). The court below committed no error in holding likewise.

Since the decision of the court below was fully in accord with the rulings of this Court and since there is no conflict between various state or federal courts on the issue, the petition for *certiorari* should be denied.

### B. The Major Hazardous Waste Facilities Siting Act Guarantees Full And Adequate Compensation To Property Owners For All "Takings" Of Their Property.

Petitioners' second major contention is that the Act violates the United States Constitution in that it gives the owner of a potential site "neither the ability to use his

property nor certainty as to the parameters of his temporary or permanent loss nor temporary compensation nor permanent compensation." Petition, pages 19 to 20. Petitioners further contend that the court below erroneously failed to consider this Court's opinion in the *First English Evangelical* case in rejecting petitioners' argument (Petition, page 20).

Respondents submit that petitioners' argument clearly does not justify issuance of a writ of *certiorari*. The opinion of the court below does not conflict with any decisions of this Court, including the *First English Evangelical* case. Several reasons support respondents' position.

First, as respondents set forth previously in this brief, the court below was entirely correct in ruling that the Act places no impediments upon the ability of the owner of a potential site to use his property. *See* page 8, *supra*. Once again, petitioners rely upon an invalid premise to support their claim.

Second, as respondents have also set forth, the periods of time petitioners cite are obviously the product of speculation. *See* page 10, *supra*. At this point no one – petitioners, respondents or the Court – can state with any certainty at all whether or not the Millstone potential site will be adopted at the end of the multi-step administrative review process and, even if it is adopted, whether condemnation proceedings will be necessary at that point. Petitioners' claim that the Act places them in a "uniquely negative position . . . for a period of at least 5 years" (Petition, page 19) is supportable only by hypothesis.

Third, the landowner is protected no matter what happens to the site. As the court below observed:

> There is no allegation that [petitioners] have lost their property or that they are threatened with losing their property. There is no evidence that if the hazardous-waste project does not go through, the permanent value of their property will nevertheless be diminished. They will be left in a fine position to develop their land. On the other hand, if it does go through, they will receive compensation for their property . . . . [*Littman v. Gimello, supra*, 115 *N.J.* at 166-167, 557 *A.*2d at 320 (Petitioners' Appendix A, page 13a)].

There is another possibility as well. If the site is adopted and more than one hazardous waste firm seeks to become the owner and operator of the facility, the value of the property could substantially rise, rather than fall, as the result of the competition between the firms for ownership of the site.

Even under petitioners' "worst case scenario" that condemnation will in fact occur *and* that compensation will be "based on a valuation already diminished by 5 years of the property's being submerged in a yellow cloud of fear, emotion and threatened condemnation" (Petition, page 20), the lower court's ruling of the Act's constitutionality is fully consistent with decisions of this Court. "[T]he valuation of property which has been taken must be calculated as of the time of the taking, and . . . depreciation in value of the property by reason of preliminary activity is not chargeable to the government." *First English Evan. Luth. Ch. v. Los Angeles Cty., supra*, 482 *U.S.* at 320, 107 *S.Ct.* at 2388, 96 *L.Ed.*2d at 267.

Accord, *Agins v. Tiburon*, 447 *U.S.* 255, 263 note 9, 100 *S.Ct.* 2138, 2143 note 9, 65 *L.Ed.*2d 106, 113 note 9 (1984).

Finally, petitioners' argument that the lower court erred by not considering this Court's decision in the *First English Evangelical* case as to the occurrence of a "taking" is totally untenable. That case is readily distinguishable. There, the issue was whether a temporary deprival of all use of property constituted a "taking" in the same way as a permanent deprival would. 482 *U.S.* at 318, 107 *S.Ct.* at 2388, 96 *L.Ed.*2d at 266. This Court stated, "We merely hold that where the government's activities *have already worked a taking of all use of property*, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." 482 *U.S.* at 321, 107 *S.Ct.* at 2389, 96 *L.Ed.*2d at 268. (Emphasis added).

In this case, even assuming the truth of all of petitioners' factual allegations, clearly no "taking" has occurred. The prohibition on development present in the *First English Evangelical* case is not found in this case, and respondents' activities to date are only those of preliminary governmental decision-making. Petitioners cannot, therefore, fit this case into the "temporary takings" ruling of the *First English Evangelical* case. Their argument that the lower court erred by failing to consider that case is meritless.

## CONCLUSION

It is respectfully submitted that for the foregoing reasons the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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DATED: October 3, 1989

# APPENDIX – COVER TO DRAFT SITE EVALUATION REPORT TO NEW JERSEY HAZARDOUS WASTE FACILITIES SITING COMMISSION CONCERNING GAF PROPOSED INCINERATOR, LINDEN, NEW JERSEY.

NEW JERSEY HAZARDOUS WASTE
FACILITIES SITING COMMISSION

DRAFT
SITE EVALUATION REPORT
GAF PROPOSED INCENERATOR
LINDEN, N.J.

MARCH 1989

TAMS CONSULTANTS, INC.